STATE OF MICHIGAN

COURT OF APPEALS

STEVEN R. FULFER,

Plaintiff/Counter defendant/Third Party Defendant-Appellant,

v

KURT KAESERMANN,

Defendant/Counter plaintiff/Third Party Plaintiff-Appellee,

and

KATHRYN SABLICH KAESERMANN,

Third Party Plaintiff-Appellee,

and

RUTH SABLICH,

Intervening Plaintiff-Appellee,

and

JO ANNE M. TODZY,

Third Party Defendant-Appellant.

UNPUBLISHED
June 21, 2011

No. 297336
Iron Circuit Court
LC No. I06-3524-CZ

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Appellants Steven Fulfer and Jo Anne Todzy appeal as of right from an amended judgment granting them an easement for ingress and egress to Todzy's cabin and one-acre parcel over a section of road to the northwest of the cabin rather than a road to the south of the cabin. This is the second time the matter is before this Court, the matter previously having been remanded to determine "the location of 'the existing road' identified in the 1974 deed." *Fulfer v*

Kaesermann, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2009 (Docket No. 284518). We vacate and remand for further proceedings, including additional findings of fact.

Prior to 1974, Gunnard and Edith Flodine owned 160 non-contiguous acres in Mastodon Township, Iron County. This included an 80-acre parcel that bordered on the southern tip of Fourth Fortune Lake[1] in Government Lot 4. In 1974, the Flodines conveyed 39 of the western 40 acres of that parcel to Joseph and Ruth Sablich. The deed "except[ed] and reserv[ed] to the grantors the cabin now existing on the property centered on (1) one square acre of land with right of ingress and egress thereto over the existing road." The Flodines subsequently conveyed the cabin acre to their daughter, Todzy, by means of a quitclaim deed. They also conveyed their remaining 120 acres, including the western 40 acres of the 80-acre parcel, to Todzy. Beginning in the mid-1980s, Todzy allowed Fulfer to hunt on her property and use the cabin. Fulfer made various improvements to the cabin and ultimately purchased all of Todzy's property other than the cabin acre. The Sabliches' property was ultimately conveyed to appellees Kurt Kaesermann and Kathryn Sablich Kaesermann. Todzy remains the owner of the cabin acre, but Fulfer continues to use it.

The only issue remaining in this appeal is the means of accessing the cabin acre. The possibilities are either a somewhat improved road running south from what the parties and trial court called the "v," or a less-improved road running northwest from the "v." The "v" is a fork that leads to the cabin. There was conflicting testimony as to which road was "the existing road" referenced in the 1974 deed, and much of the testimony pertained to relatively recent accessibility. The trial court previously declined to make a finding on that issue. On remand, the trial court, without engaging in any further proceedings, issued a single-paragraph opinion stating, without any further explication, "that 'the existing road' in 1974 was the road running north and west from the cabin" and enjoining plaintiff from using the road running south. This appeal followed.

A factual finding made by a trial court following a bench trial is reviewed for clear error. *Schumacher v Dep't of Natural Res*, 275 Mich App 121, 127; 737 NW2d 782 (2007). For such a finding to be clearly erroneous, this Court must be left with a firm and definite conviction that a mistake has been made after reviewing the entire record. *Id*. at 130. In making its review, this Court defers to the trial court's superior opportunity and expertise in evaluating the credibility of witnesses before it. MCR 2.613. The trial court is required to articulate its findings of fact on the record, but it is sufficient for the trial court to make manifest its understanding of the factual issues and correct application of the law. MCR 2.517(A); *In re Forfeiture of $19,250*, 209 Mich App 20, 28-29; 530 NW2d 759 (1995). We find ourselves unable to resolve, on this record, whether the trial court's finding is supported by the evidence or is the product of a correct application of the law, particularly in the absence of any explanation of why the court found "the existing road" in 1974 to run only to the northwest. We are further unable to determine whether this outcome is equitable.

[1] Some of the maps we have found refer to the lake as Third Lake.

When interpreting the construction of a deed, the primary objective of this Court is to give effect to the parties' intentions. *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 620; 761 NW2d 127 (2008). The controlling intent of a deed is that expressly written, which manifests the parties' actual intentions and not one's own private and unrevealed belief. *Bufe v Rudell*, 286 Mich App 391, 409-410; 780 NW2d 884 (2009). This Court must read the instrument as a whole to give adequate effect to the parties' intent. *City of Huntington Woods*, 279 Mich App at 620-621. A written deed is presumed to contain the entire agreement and intent of the parties. *Bufe*, 286 Mich App at 410. If the writing is clear, this Court must give full effect to the writing and parole evidence will be inadmissible. *Id*. However, if the writing is ambiguous, extrinsic evidence may be used to determine the intent of the parties. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 48-49; 700 NW2d 364 (2005). A document may be latently ambiguous, as shown by extrinsic evidence, when a facially clear term cannot be applied without resolving some kind of choice, the resolution to which is not specified. *Shay v Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010).

The 1974 deed itself appears on its face to be unambiguous. But there are multiple possible "existing roads," and although the deed clearly reserves access over precisely one of them, it does not even hint at identifying which one. The deed is therefore latently ambiguous and is properly interpreted in light of extrinsic evidence. Unfortunately, much of the extrinsic evidence regarding the access to and on the Kaesermanns' property pertained only to relatively recent times, not to the state of the property in 1974.

On the same date as the 1974 deed, Gunnard Flodine wrote a letter to Joseph Sablich that asked for Sablich to "send [him] the deed stipulating reservation of cabin, one acre and right-of-way confirmation" once it was "officially completed." In relevant part, the letter also read:

> I think that you would have a much better road going in from west side. Will check next trip, next week as I believe there is a raod [sic] going right up to your property. No steep hills, just about all level. There is a short distance thru [sic] maple woods where a few pot holes in road after rain, but a few loads of sand from your forty, would make a very good woods road. I would be willing to pay my share for the labor, even if you couldn't get Hammerberg and Hyerman [owners of property to the north of the 39-acre parcel] to go 25% each. . . .

This letter simply does not prove anything by itself. It could be construed as implying the existence of some means of access other than the road to "the west," because presumably the property was approached by some other route, but nothing in the letter confirms that any other roads exist. It could be construed as a statement that if there is no road to "the west," then there is no other road. It could be construed as a statement that there *is* a road to "the west," and it could be construed as a statement that there *may* be a road to "the west." It is not even clear if the road to "the west" in the letter is the road to the northwest at issue in this matter.

Perhaps more significantly, the letter addresses how the *Sabliches* could access *their* property—in other words, the 39 acre parcel. The letter is silent as to how one might get to the cabin. By definition, a road "going right up to your property" would be a road outside the boundary of the Sabliches' (now the Kaesermanns') property altogether. In short, this letter is of no use in determining what the "existing road" to the cabin was in 1974.

Furthermore, our review of the various testimonies and exhibits suggests to us at least a strong possibility that in 1974, "the existing road" ran all the way through the property, from the south, past the "v" forking to the cabin, and continuing to the northwest. Also apparently never considered below is the possibility of a mutual mistake, in that there may have been two existing roads in 1974.

Kathryn Kaesermann testified that in 1974 there was a network of overgrown logging roads in the area, including a path or "little road" traversing the entire 39-acre parcel from the southern property boundary to the northern boundary. This is consistent with a survey done in 2007, which shows the southern road, which had subsequently been improved, and the currently unimproved road that went off to the northwest. The owner of a considerable amount of the surrounding property agreed that the entire area contained "hundreds and hundreds and hundreds of miles of skid trails, trails, walking roads," but cautioned that "the definition of 'road' would have to be clarified" before he could say that there was one running through the property.[2]

Ruth Sablich indicated that the only way to get to the cabin entailed approaching from the south, but that one had to walk part of the way because "there wasn't a road." She opined that the only possible "existing road" in the deed was the path from the south, but she admitted she had only been to the property twice. Kathryn Kaesermann stated that although it was not passable at the time of trial, there was an existing road in 1974 from the west that was lightly travelled, a shorter distance, and "[t]he road they were using to get there." Todzy testified that from approximately 1948 through 1990, she had always accessed the cabin from the south, and she was unaware of any other access route to the cabin. Therefore, of the witnesses who had been familiar with the property in 1974, some indicated that the cabin was accessed from the south and some indicated that it was accessed from the northwest.

Without understanding why the trial court arrived at the conclusion that "the existing road" went to the northwest, we are unable to say that it was or was not clearly erroneous. There is some strong implication from the evidence that "the existing road" was likely some kind of old logging trail, possibly one that traversed the entire length of the property. However, we are not a fact-finding court. We are also concerned by the implication from the record, confirmed at oral argument, that the route to the northwest is inaccessible because of actions of non-party adjoining landowners, making the cabin acre functionally landlocked. We have no way to determine whether this is true, nor do we have any way to determine whether, under the circumstances of the facts and parties here, the trial court's result is therefore equitable.

[2] He assumed that the cabin was accessed from the south, but this seemed to be in part because the property owners to the northwest had blocked access through the road in that direction, and he admitted that he had never personally seen anyone access the cabin.

We do not hold that the trial court's result is necessarily clearly erroneous or inequitable. We simply cannot make that determination without a further understanding of why the trial court arrived at that result. We therefore vacate it and remand for further findings of fact and proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher